



**Agua Special Utility District**  
P. O. Box 4379 | Mission, Texas | 78573-0075  
(956) 585-2459 | FAX (956) 585-1516

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September 6, 2019

O.G. Construction Company, LLC.  
4021 N. Closner Blvd.  
Edinburg, Texas 78541

**Via CMRR: 7017 0190 0001 1863 3085**

**Via USPS Regular Mail**

**Via E-mail: omar@ogbuild.com; diana@ogbuild.com**

**Via Fax: 956-682-4779**

Re: Agua SUD's Palmview Wastewater Collection System (Phase-I, Group A&G) Project No. U1877;  
EDAP Contract No. G16000

Dear Mr. Garcia,

This correspondence is being sent on behalf of Agua Special Utility District OWNER (the "OWNER"). As you know, the OWNER and O.G. Construction Company, LLC ("CONTRACTOR") entered into a written contract dated June 23, 2017 for Project No. U1877 (the "Contract") whereby CONTRACTOR agreed to, among other items, construct Agua SUD's Palmview Collection System located in Palmview, Texas (the "Project").

The Contract requires CONTRACTOR to furnish all equipment, materials, goods, services, and labor necessary to complete all Work as specified or indicated in the Contract Documents for the ("Project"). Additionally, the Contract requires the CONTRACTOR perform all Work in accordance with the Contract Documents and that all complete Work complies accurately with the Contract Documents. Despite its contractual obligations, and as discussed herein, CONTRACTOR has failed to perform the Work in accordance with the Contract Documents and has failed to complete the Project as required in a timely manner.

The Contract provides that time is of the essence. CONTRACTOR agreed to complete the Project in 330 days from the Notice to Proceed as required by Document 00020-Notice to Bidders, which has been included in the Contract Documents. The Notice to Proceed letter, dated September 13, 2017, that was issued to the CONTRACTOR indicated a Project commencement date of September 27, 2017.

Accordingly, CONTRACTOR was originally required to complete the Project no later than August 22, 2018. The completion date was extended by OWNER pursuant to two change orders and extending the contact date to 504 calendar days with a completion date of February 13, 2019. As of the date of this letter, the Project remains incomplete. Pursuant to the Contract, the OWNER may assess liquidated damages in the amount of \$2,000.00 per day for each day the CONTRACTOR fails to timely complete the Project. As of the date of this letter, the Project is 205 days late, thereby entitling the OWNER to \$410,000 in liquidated damages.

The OWNER's right to assess liquidated damages does not depend on acquiescence by the CONTRACTOR. Therefore, the OWNER has rejected CONTRACTOR's attempt to mediate the on-going delay claim. CONTRACTOR may reserve its rights as it relates to the assessment of liquidated damages, but the CONTRACTOR does not have a contractual right to compel such mediation at this time. The OWNER will agree to a contractually required mediation prior to the initiation of any litigation, but it has no obligation to proceed to mediation while the CONTRACTOR continues to perform or remains in default. OWNER hereby reserves its right to demand compliance with the contractual dispute resolution provisions and does not waive any rights or remedies to which it may be entitled under contract or applicable law.

Additionally, CONTRACTOR'S recent applications for payment demonstrate an unacceptable lack of progress in the Project. The project has not been adequately staffed or managed, which has exacerbated the delay issues. The Contract requires the CONTRACTOR to provide adequate personnel, with appropriate skills, and equipment to perform the Work. As evidenced by CONTRACTOR's extreme delay, CONTRACTOR has failed to provide adequate equipment and labor to complete the Project within the Contract time. An example is the construction of the Gravity Line at G1 which requires a bore by augering across La Homa Road which was scheduled on March 6, 2018 and is still under construction. The CONTRACTOR's submitted schedule indicated 40 days to complete the construction of the gravity line at G1. Moreover, the Engineer of Record and OWNER has repeatedly instructed CONTRACTOR to provide an updated construction schedule, which CONTRACTOR has failed to do.

Per the Contract, the CONTRACTOR is required to provide access to all inspection personnel in a reasonable and timely manner. The CONTRACTOR has refused to provide access and cooperate with video inspection personnel designated by the OWNER as to assess work quality. The CONTRACTOR has alleged in written and verbal communications that OWNER is trespassing on the Project owned by OWNER, which is an incredulous position. The CONTRACTOR's allegations of trespass are without merit, are facially invalid, and in contravention to the Contract and law. Further, the results of the inspections that the CONTRACTOR sought to prevent reveal numerous deficiencies in CONTRACTOR's work. Clearly, the CONTRACTOR's motivation for interfering with the televised inspection was to prevent the discovery of deficient Work known to the CONTRACTOR.

The video inspections have revealed deficiencies which are non-compliant with the plans and/or specifications and therefore require correction. Pursuant to the Contract, CONTRACTOR has been notified in writing of said deficiencies and the requirement to perform corrective work.

The CONTRACTOR has failed to complete critical components of the Project despite the fact that the CONTRACTOR agreed all of the Project work shall conform to the requirements and specifications. To date, CONTRACTOR has shown inadequate effort to show that the deficiencies will be addressed in the future.

Another example of the CONTRACTOR's quality of work being deficient is the installation of Sewer Line G7-a which was installed outside the prescribed alignment and easement without prior approval from OWNER. This failure to locate the Work within the Project boundaries is non-compliant and in breach of the Contract. Subsequent work by the CONTRACTOR relocated the sewer line within the

easement but not within the prescribed alignment which is yet another event of default that is not acceptable to the OWNER. The CONTRACTOR has refused to correct this deficiency and insists the OWNER should accept the work as currently constructed.

During the course of the Project, the CONTRACTOR has been non-responsive and/or confrontational to the OWNER's requests for corrective action of deficiencies and directives to scope of work and Change Orders. A list of these OWNER's requests and CONTRACTOR's response to these requests is presented below:

- a. S&B, the ENGINEER, understands that CONTRACTOR has refused to execute Change Order No. 4 issued on April 15, 2019 and is therefore not in compliance with the Agreement (Specification Section 01255 Change Order Procedures, Item 1.07).
- b. CONTRACTOR failed to address the Sanitary Sewer Line G7-a alignment deviations as directed in a letter issued on July 8, 2019 to CONTRACTOR on behalf of OWNER.
- c. CONTRACTOR refused to acknowledge project deficiencies identified in televised inspection report as directed in a letter dated August 12, 2019 to CONTRACTOR on behalf of OWNER.
- d. CONTRACTOR repeatedly refused to create an escrow account (Specification Section 00500 Agreement between OWNER & CONTRACTOR, Item 3.03 B) to provide funds to cover fees incurred for additional inspection services per the Agreement.
- e. CONTRACTOR conducted activities outside the previously agreed work schedule without proper notification to OWNER (Specification Section 01452 Inspection Services, Item E).
- f. S & B understands that CONTRACTOR has denied any responsibility for corrective actions and repairs identified in the additional televised pipe inspection report, letter dated August 12, 2019, as indicated to OWNER by CONTRACTOR during a meeting held on August 22, 2019.

The foregoing issues are not an exhaustive list of CONTRACTOR's events of default. The foregoing issues merely demonstrate that CONTRACTOR has materially breached the Contract and defaulted on its obligations. Given the CONTRACTOR's unwillingness to remedy and cure the defaults previously noticed, the OWNER provides this Notice to Cure as a final effort to compel contractually required performance of CONTRACTOR despite the fact that the OWNER has already been damaged, and will continue to be damaged, by the delays, acts, errors and omissions of CONTRACTOR. For any and all

such damages that the CONTRACTOR fails to cure or cannot cure, the OWNER expressly reserves all rights and remedies to which it may be entitled pursuant to the Contract and applicable law.

Article 15.02 of the Contract General Conditions states OWNER May Terminate for Cause upon the occurrence of any one or more of the following events of default:

1. CONTRACTOR's persistent failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the progress schedule established under paragraph 2.07 as adjusted from time to time pursuant to paragraph 6.04);
2. CONTRACTOR's disregard of Laws or Regulations of any public body having jurisdiction;
3. CONTRACTOR's disregard of the authority of OWNER's Representative or ENGINEER;
4. CONTRACTOR's violation in any substantial way or any provisions of the Contract Documents;
5. Failure of CONTRACTOR to pay subcontractors and/or material suppliers; or
6. CONTRACTOR's violation of OWNER's ethics policy.

OWNER has obtained an opinion letter and certificate of the ENGINEER that sufficient cause exists to justify such action to terminate CONTRACTOR, without prejudice to any other right or remedy that may be available to OWNER. The referenced letter is attached hereto. Accordingly, OWNER hereby provides CONTRACTOR Notice to Cure as required by section 15.02(B). IF CONTRACTOR fails to cure within the requisite timeframe, OWNER shall terminate the CONTRACTOR's rights to continue to perform under the Contract and shall make immediate demand on SURETEC INSURANCE COMPANY, (the "Surety"), to honor its obligations under the performance bond to cure said defaults and complete performance of the Work and CONTRACTOR's obligations under the Contract.

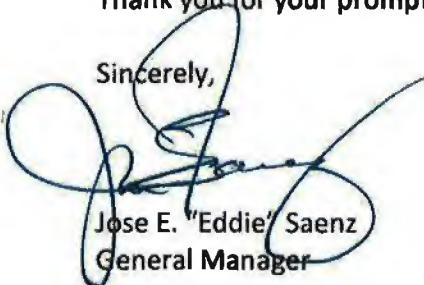
Please be advised that, should CONTRACTOR fail to cure, thereby necessitating the termination action allowed by 15.02 and noticed above, and should Surety fail to honor its performance bond obligations, OWNER will seek to recover all damages, costs and expenses related to the correction of deficient performance and the completion of the Project from CONTRACTOR and Surety jointly.

Nothing in this letter shall, or is intended to, waive, alter, or limit the causes of action, rights, remedies, and/or amount of damages that the OWNER may seek or recover from or against any party, including, without limitation, CONTRACTOR and/or SURETEC INSURANCE COMPANY.

If you have any questions about this correspondence, please contact me at (956) 585-2459.

Thank you for your prompt attention to this matter.

Sincerely,

  
Jose E. "Eddie" Saenz  
General Manager

cc:	S&B Infrastructure, Ltd., Project Engineer	VIA EMAIL:	<a href="mailto:vrkajuluri@sbinfra.com">vrkajuluri@sbinfra.com</a> <a href="mailto:HJLopezS@sbinfra.com">HJLopezS@sbinfra.com</a>
	:Francisco J. Garza, OWNER Attorney	VIA EMAIL:	<a href="mailto:fgarza@figarzalaw.com">fgarza@figarzalaw.com</a>
	SureTec Insurance Company	VIA CMRR:	<a href="tel:70170190000118633092">7017 0190 0001 1863 3092</a>
	Texas Water Development Board	VIA EMAIL:	<a href="mailto:Mireya.Loewe@twdb.texas.gov">Mireya.Loewe@twdb.texas.gov</a> <a href="mailto:Donald.Dawkins@twdb.texas.gov">Donald.Dawkins@twdb.texas.gov</a> <a href="mailto:Juan.Santana@twdb.texas.gov">Juan.Santana@twdb.texas.gov</a>

Enclosures



September 5, 2019

Mr. Jose E. Saenz, P.E.  
General Manager  
Agua Special Utility District.  
3120 N. Abram Road  
Palmview, Texas 78573

Re: OG Construction LLC's Work Performance Evaluation  
Palmview Wastewater Collection System Project, Group A&G  
EDAP Contract No. G16000

Dear Mr. Saenz,

As you requested during our meeting on August 23, 2019, S&B Infrastructure, Ltd. (S&B) is providing this evaluation of various work performance items and activities by OG Construction Company, LLC (Contractor) on the above referenced project and Agreement with Agua Special Utility District (Owner), dated June 23, 2017 (the "Agreement"). A list of items and activities by Contractor considered to be non-compliant with the Agreement are presented below.

**1. Contract Time:**

Per the Agreement, the project construction was to be completed within a 330 calendar day period (Specification Section 00020 Notice to Bidders, Item 4). The Notice to Proceed was issued on September 13, 2017 with a construction start date of September 27, 2017. Subsequently, Change Order No.1 granted an additional 78 calendar days and Change Order No.2 granted an additional 96 calendar days, extending the contract time to a total of 504 calendar days. Based on the revised Contract Time, the work under the Agreement expired on February 13, 2019. The Contractor has been subject to Liquidated Damages (Specification Section 00500, Article 3.03) since that date. As of to-date the contractor has accumulated 203 calendar days beyond contract time, resulting in an estimated cost of \$406,000 in liquidated damages.

During the course of the work, and as part of the Agreement, the Contractor failed on several occasions to meet the required project schedules (Specification Section 01326 Construction schedule, Item 1.01 B) submitted during the monthly project meetings. Despite recommendations from the Owner as to ways to get back on schedule, the current project status proves that the Contractor failed to implement effective recovery measures and failed to comply with the contract time requirements and standard of care in the performance of their contractual obligations.

**2. Lack of Personnel/Equipment:**

The Agreement requires the Contractor to provide adequate Personnel, with appropriate skills, and Equipment (Specification Section 00423 Certificate of Bidders Experience and Qualifications) to perform the Project. As evidenced by the Contract Time discussed above, the Contractor has neither provided additional equipment nor additional personnel

based on productivity obtained during the course of the work to complete the project within the contract time. An example of this is Contractor's approach to the construction of Gravity Sewer Line G1 which requires a bore by augering across La Homa Road. This work which was scheduled on March 6, 2018 is still under construction. Based on the Contractor's submitted schedule, this work was originally anticipated to be completed within 40 calendar days. In addition, the Contractor has failed to demonstrate good faith effort based on the working conditions encountered during its execution to provide specialized personnel/equipment to perform the bore work and deemed necessary for completion in a timely manner.

S&B's opinion is that the Contractor failed to meet the minimum standard of care in the performance of their contractual obligations by not providing appropriate personnel with knowledge, skill and equipment to complete the work

**3. Contractor's Denial to Work Areas for Inspection**

Per the Agreement, the Contractor is required to provide access to all inspection personnel in a reasonable and timely manner (Specification Section 01452 Inspection Services, Item 1.02B). S&B's understanding is that the Contractor initially refused to provide access and cooperate with additional inspection services requested by Owner. The Owner reportedly requested access to perform televised inspections of work conducted by Contractor to assess work quality. It is S&B's understanding that Contractor eventually allowed access but continued to protest Owner conducting those inspections. The result of the additional inspections by Owner observed deficiencies which are non-compliant with the plans and/or specifications and therefore merit correction by Contractor as Contractor was notified by a letter dated August 12, 2019.

If S&B's understanding of the above incident is correct, then S&B is of the opinion that the Contractor failed to comply with the Agreement and failed to meet the minimum standard of care in the performance of their contractual obligations by failing to provide access to additional inspection services as requested by Owner.

**4. Contractor's Quality of Work:**

During the course of the work, the Contractor installed a section of Sewer Line G7-a outside the prescribed alignment and easement without prior approval from Owner, which is non-compliant (Specification Section 00500, Article 1). Subsequent work by Contractor to correct this deficiency resulted in relocating the referenced sewer line within the easement but not within the prescribed alignment, and not considered acceptable by Owner. The Contractor has refused to correct this deficiency and insists the Owner should accept the work as currently constructed.

S&B opinion is the Contractor failed to comply with the Agreement and failed to meet the minimum standard of care in the performance of their contractual obligations by failing to install the sewer line "G7-a" as per the project plans and specifications.

**5. Contractor's Disregard for Directives**

During the course of the work the Contractor has been non-responsive and/or confrontational to the Owner's requests for corrective action of deficiencies and directives to scope of work and Change Orders (Specification Section 01255 Change Order

Procedures, Item 1.11A). A list of these Owner's requests and Contractor's response to these requests is presented below.

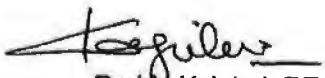
- a. S&B understands that Contractor has refused to execute Change Order No. 4 issued on April 15, 2019 and is therefore not in compliance with the Agreement (Specification Section 01255 Change Order Procedures, Item 1.07).
- b. Contractor failed to address the Sanitary Sewer Line G7-a alignment deviations as directed in a letter issued on July 8, 2019 to Contractor on behalf of Owner.
- c. Contractor refused to acknowledge project deficiencies identified in televised inspection report as directed in a letter dated August 12, 2019 to Contractor on behalf of Owner.
- d. Contractor repeatedly refused to create an escrow account (Specification Section 00500 Agreement between Owner & Contractor, Item 3.03 B) to provide funds to cover fees incurred for additional inspection services per the Agreement.
- e. Contractor conducted activities outside the previously agreed work schedule without proper notification to Owner (Specification Section 01452 Inspection Services, Item E).
- f. S & B understands that Contractor has denied any responsibility for corrective actions and repairs identified in the additional televised pipe inspection report, letter dated August 12, 2019, as indicated to Owner by Contractor during a meeting held on August 22, 2019.

Based on the above listed observations, S&B is of the opinion that the project objectives and contractual obligations by Contractor are not being met and will result in additional project delays, non-timely completion, and potential deficiencies in the quality of work. Furthermore, the communication and working relationship with Contractor is currently problematic in terms of addressing deficiencies observed. Directives issued as comments and observations are typically challenged and/or not acknowledged as valid. Contractor has taken a confrontational posture toward Owner by disregarding directives aimed at correcting deficiencies so the work can be brought into compliance with the project plans and specifications.

S & B warrants that the observations and opinions presented in this letter have been made in good faith and in accordance with S&B's contract with Owner and generally accepted professional practice in the local area.

If you have any questions, or need additional clarifications, please contact us at your convenience at (956) 926-5000.

Sincerely,  
**S&B Infrastructure, Ltd.**  
TBPE Firm No. F-1582

  
Reddy Kajuluri, PE  
Project Engineer

  
Hector J. Lopez, PE  
Project Manager

cc: Daniel O. Rios, P.E. – S & B  
Donald Bailor – S & B  
Frank Garza – Agua SUD